STATE OF MAINE
CUMBERLAND, ss.

MAINE LAW COURT
DOCKET NO. Cum-19-338

STATE OF MAINE	)	
	)	**DEFENDANT'S MEMORANDUM**
v.	)	**OF LAW WITH INCORPERATED**
	)	**STATEMENT OF FACTS**
SAHAL HOURDEH	)	

NOW COMES Defendant, Sahal Hourdeh, by and through his counsel, Clifford B. Strike, and hereby respectfully MOVES this Honorable Court to reverse the conviction entered against Defendant in Docket Number CR-17-2056 pursuant to a terminated deferred disposition agreement. As Defendant's deferred disposition was terminated based upon evidence derived from the illegal stop and questioning of Defendant on or about October 14, 2018, in Westbrook, ME, and as such evidence was obtained in violation of Defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, § 6 of the Maine Constitution, we pray this Court will remedy the resulting procedural and constitutional harms.

Defendant brings this memorandum before this Court seeking Probable Cause for this appeal pursuant to Rule 19 of the Maine Rules of Unified Criminal Procedure. The grounds for Defendant's assertions are further stated in the incorporated statement of facts and memorandum of law.

FACTS

1. Defendant was charged with Unlawful Trafficking of Scheduled Drugs, a class B crime and Violation of Condition of Release, a class E crime, in Docket

Number CR-18-5644. Defendant had been previously released on bail conditions stemming from charges in Docket Number CR-17-7056. Defendant had entered into a deferred disposition agreement in Docket Number CR-17-7056.

2. On October 14, 2018, Officer Bleicken was patrolling Brown Street in Westbrook, Maine, and observed a red Nissan Altima traveling on Cumberland Street. Upon running the registration of the vehicle, he found that the registered owner was on bail conditions and was subject to search.

3. Officer Bleicken's stated reasons for pursuing the vehicle were to "check for vehicle defects, or traffic violations." Office Bleicken also indicated that based on the route the vehicle was taking, he believed the vehicle was attempting to elude him.

4. Officer Bleicken followed the vehicle into a private parking lot, he activated his blue lights and takedown lights, and approached, seized, and searched Defendant, despite having no reasonable articulable suspicion to conduct a stop.

5. Contraband was recovered from Defendant.

6. Due to the stop of Defendant being in violation of his constitutional rights, any inculpatory evidence obtained as a result of the illegal stop and seizure was ordered suppressed on February 2, 2019 by the honorable Justice Fritzche. The case in Docket Number CR-18-5644 was then dismissed by the State.

7. Subsequently, on March 21, 2019, a hearing was held on the State's motion to terminate Defendant's deferred disposition. An issue of procedure and law was broached as to whether the evidence that was suppressed could be admitted during a deferred disposition termination proceeding. The hearing was continued and a memorandum of law addressing the question was submitted by Defendant.

8. Pursuant to the submission of memoranda of law, the honorable Justice Cashman ordered on May 3, 2019, that suppressed evidence from the dismissed case could be heard at a deferred disposition proceeding pursuant to *State v. Caron*, likening such a proceeding to that of a probation revocation hearing with applicable evidentiary standards sounding in lesser constitutional due process and contract law. *State v. Caron*, 334 A.2d 495, 497 (Me. 1975)

9. Subsequently, on August 6, 2019, Defendant had the suppressed evidence presented against him at the deferred disposition proceeding. Defendant was found guilty and sentenced before the honorable Judge Warren.

10. Defendant timely appealed following the adjudication

SUMMARY OF THE ARGUMENT

The Maine Rules of Unified Criminal Procedure hold that, upon the granting of an order to suppress illegally obtained evidence, "the court shall enter an order limiting the admissibility of the evidence according to law." M.R.U. Crim. P. 41A This Maine Rule of Unified Criminal Procedure applies to "all criminal proceedings." M.R.U. Crim. P. 1(b)(1). The questions before this Court, then, necessarily become what evidentiary standards are required by law and whether the termination of a deferred disposition is a "criminal proceeding." By statute, the court "may order sentencing deferred to a date certain or determinable" and, pursuant to this deferral, "a person is deemed to have been convicted when the court imposes sentence." 17-A M.R.S.A. §§ 1348-A(1), (4). The Maine Law Court has held that "sentencing itself... is a critical stage of a criminal proceeding. *Stack v. State*, 492 A.2d 599, 602 (Me. 1985). The analysis, however, must include two more questions. Whether the deferred sentencing provision is a singular entity or comprised of a deferral procedure followed by a sentencing and, if the latter, whether the distinction matters at all.

The Supreme Court implicitly considered this question in the context of whether legal counsel was required at a probation revocation proceeding that would lead to sentencing. There, the Court concluded that "a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." *Mempa v. Rhay*, 389 U.S. 128, 137 (1967). Putting a fine

point on that conclusion, the Supreme Court qualified its decision in *Mempa v. Rhay* when deciding *Morrisey v. Brewer,* stating that their "holding in Mempa v. Rhay…was distinguished on the ground that it involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding." *Morrissey v. Brewer*, 408 U.S. 471, 475 (1972). Thus, the Supreme Court suggests that there is no daylight between a statutorily constructed procedure, such as probation or sentencing deferral, and the sentencing itself if the latter is implicated by the former. In the alternative, if the Court should decide that there is a distinction between the two, stare decisis demonstrates that it is not dispositive. Defendant contends that termination of a deferred disposition, whether viewed procedurally, statutorily, or constitutionally, is a "criminal proceeding" within the meaning of the law and, as such, both Maine Rule of Unified Criminal Procedure, heightened Due Process standards, and Federal Suppression Doctrine should apply.

ARGUMENT

A. The Maine Rule of Unified Criminal Procedure 41(e) Should Apply to a Deferred Disposition Proceeding.

Not every proceeding before the court in the state criminal justice system is considered a stage of a criminal prosecution to which the Maine Rules of Unified Criminal Procedure apply. Salient to the instant case, this Court has held that, pursuant to *State v. Caron*, a mere probation revocation hearing is not a "stage of a criminal prosecution." *State v. Caron*, 334 A.2d 495, 497 (Me. 1975). The *Caron* Court based its analysis upon *Morrissey v. Brewer* and *Gagnon v. Scarapelli,*

which demonstrated that a hearing to "revoke a probation granted incident to the imposition, and suspension of the execution, of a sentence for guilt of crime" is not a stage of a criminal prosecution. *Id.* The Supreme Court, in *Morrissey v. Brewer*, stated that parole hearings were "not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply" because the proceedings "arise after the end of the criminal prosecution, including imposition of the sentence." *Morrissey*, 408 U.S. at 480. The *Gagnon* Court, extending that conclusion to probation revocation hearings, echoed the reasoning in *Morrissey* when it stated that probation revocation "does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973).

This Court, however, has never ruled on extending such a concept to proceedings to terminate a deferred disposition. The cases cited as support for *Caron* are grounded upon the notion that the subjects standing to lose their provisional liberty have already been convicted and sentenced for a crime. Thus it follows in the Maine context that suppression actions, controlled by rule 41(e) of Maine Rules of Criminal Procedure, do not apply to probation revocation hearings (*see* M.R.U. Crim. P. 1).

However, a deferred disposition is distinct from parole and probation in a pivotal and dispositive way. Probation is a mechanism whereby one "convicted of a crime may be sentenced to a[n] … alternative" but one subject to a deferred disposition is deemed to "have been convicted when the court imposes the sentence" after the term of the deferred disposition has terminated, either by agreement or motion. 17-A M.R.S.A. §§ 1201, 1348-A(4). Thus, the law described in *Caron* should not extend, via analogy, to a deferred sentencing as that analogy is fundamentally flawed. The cases cited above describe parole and

probation proceedings as being imbued with lesser due process standards then critical stages of a criminal proceeding because those subject to their provisions have been adjudicated guilty and sentenced. Probation or parole, then, dealt only with the nature of their liberty after conviction.

In the instant case, Dfendant had entered a provisional guilty plea pursuant to the terms of the deferred disposition, which statutorily holds that one is convicted "when the court imposes sentence." 17-A M.R.S.A. § 1348-A(4). It must be understood that a deferred disposition and sentencing, together a deferred sentencing, whether viewed as the same thing or inextricably linked (*see Mempa v. Rhay*), implies that a much greater liberty interest is at risk than probation or parole. In this context, the *Mempa* Court's analysis is clear; a significant stage of a criminal proceeding is one "where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). Upon termination and the resulting sentencing, at which point a conviction attaches, the liberty rights of the Defendant, who is still innocent until proven guilty prior to that point, are necessarily deprived and curtailed. A termination of a deferred disposition proceeding must be understood as a critical stage of the criminal proceeding, as referenced by the Maine Rule of Unified Criminal Procedure 1(b), as this is the very process that the heightened procedures and rules of a criminal proceeding are meant to protect.

B. Constitutional Due Process Rights and Federal Exclusion Doctrine Should Apply to a Deferred Disposition Proceeding.

In addition to the structural and procedural questions surrounding the designation of "a stage of a criminal proceeding" and the application Maine Rules of Unified Criminal Procedure, Due Process considerations and the fundamental

rights found in the Fourth Amendment underlie the argument brought to the fore by this case.

I. The Due Process Clause of the United States Constitution, Made Applicable to the State of Maine Via the Fourteenth Amendment, Should Bar the Use of Suppressed Evidence from a Dismissed Case at Any Stage of a Deferred Sentencing.

While *State v. Caron* does not undertake a substantive analysis of the Due Process interests implicated in the revocation of probation, it does rely upon *Morrissey v. Brewer*'s requirement of an "informal hearing" based upon "verified facts." *Morrisey*, however, is clear about the pertinent analysis. "Whether any procedural protections are due depends upon the extent to which an individual will be condemned to suffer grievous loss." *Morrisey*, 408 U.S. at 481 (internal quotations omitted). "Once it is determined that due process applies, the question remains what due process is due... due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

The *Morrisey* Court then applied its' due process analysis to the interests of the state as contrasted to the interests of a parolee, acknowledging that, while the provisional liberty interest held by post-conviction criminals is less than that of person who has not been convicted of a crime, "the liberty of a parolee, although intermediate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss." *Morrissey*, 408 U.S. at 482. In such an instance, the court determined that the balance of interests between a parolee and the state is best met with a due process requirement of "an informal hearing structured to assure that the finding of a parole violation will be based upon verified facts." *Id*, at 484.

In the instant case, unlike convicted parolees or those serving an alternative sentence of probation pursuant to a conviction, a defendant on a deferred disposition is necessarily *un-convicted and unsentenced* (*see §1348-A(4)*). Due process must recognize that such liberty interests are significantly higher than even the "grievous loss" that would be suffered by a parolee or probationer. The flexibility of the Due Process Clause would have to accommodate little stretch, in light of such increased liberty interest, to cover barring suppressed evidence from a dismissed case being introduced at a deferred sentencing proceeding.

II. Federal Exclusionary Doctrine Should Bar the Use of Suppressed Evidence from A Dismissed Case at a Deferred Sentencing.

State v. Caron, in the context of probation revocation, inquires whether the "evidence-exclusionary rule, as an independently operative remedy for violations of the Fourth Amendment... has applicability to a hearing for revocation of probation granted incident to the imposition and suspension of the execution, of a sentence for guilt of a crime." *Caron*, 334 A.2d at 499. In that case, the Court dispensed with the notion that the exclusionary doctrine from *Mapp v. Ohio* would apply to simple probation revocation proceedings. Illustrative of the point is the language of *United States ex rel. Sperling v. Fitzpatrick, supra*:

> "A . . . [probation] revocation proceeding is not an adversarial proceeding. . . [It] is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the [Probation and] Parole Board. To apply the exclusionary rule to . . . [probation] revocation proceedings would tend to obstruct the . . . [probation] system in accomplishing its remedial purposes.

United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-64 (2d Cir. 1970). The *Morrissey* Court also analysed the function of the parole system which has similar remedial functions as probation, namely to rehabilitate and reintroduce convicted persons serving sentences into society. *Morrisey*, 408 U.S. at 478. Thus, the deterrence effect upon state agents is too ancillary from the purposes of these post-conviction proceedings. This Court, in a much more recent case dealing with the question of whether Fifth Amendment protections attached to evidence in a probation proceeding, specifically held "open the possibility that the exclusionary rule may apply in probation revocation hearings when a defendant demonstrates a need to deter 'widespread police harassment' that deprives the probationer of due process." *Stave v. Johansen*, 2014 ME 132, ¶ 17.

The instant case, which involves a deferred sentencing of a hitherto un-convicted defendant who had not been sentenced, is a prime example of potential police harassment working a due process deprivation. If allowed to stand, this case would demonstrate that a state entity, such as a police officer, could target persons at liberty on deferred dispositions with illegal searches and seizures and substantially curtail their freedoms. The unconstitutional conduct on the part of police officers, even if suppressed at trial, would carry over into differed sentencing proceedings and virtually ensure that their targets find themselves saddled with the "bad outcome" of that deferred disposition. Thus, if this Court should rule that evidence suppressed for unconstitutional conduct on the part of the police officer is admissible as a deferred sentencing, officers might be incentivized to sidestep the law and constitution knowing that their target is sure to suffer a liberty detriment even when the instant controversy is likely to be subject to suppression and dismissal.

CONCLUSION

In the instant case, Defendant was unconstitutionally searched, and evidence was seized. This Court rightfully remedied the constitutional deprivation by suppressing any such evidence found pursuant to the illegal search and dismissing the case it had brought pursuant to that evidence. The State contends, however, that such suppressed evidence should be admissible in the termination of a deferred disposition as it is not "a stage of a criminal prosecution." Such a contention is clearly at odds with the law as understood by the highest Court of this land and the policy that informs it. Defendant's termination hearing is not there simply to decide the nature of his post-conviction liberty; it is an adversarial proceeding that will ultimately decide what conviction the Defendant shall be found guilty of pursuant to the deferred disposition sentencing process. As such, it is an adversarial proceeding that is a critical stage of the criminal prosecution as it was understood by the Supreme Court in *Mempa v Rhay*. Thus, Maine Rule of Criminal Procedure 41(e) should apply here. Additionally, the Due Process Clause of the United States Constitution and the stare decisis of the Supreme Court dictated in *Mempa* that heightened protections attach in such a critical stage of a criminal proceeding and, as such, the heightened due process considerations and the doctrine of exclusion elucidated in *Mapp v. Ohio* should likewise apply to disallow any evidence suppressed as a result of a constitutional deprivation.

Based on the law and policy described above, Defendant asserts that the deferred disposition termination proceeding is a "stage of a criminal proceeding" and, as such, he has a procedural and constitutional claim to the protections

afforded by law. Defendant prays that this court will recognize precedent and order that the alleged inculpitory evidence remain suppressed.

Dated: October 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused notice of the foregoing **Memorandum For PC** to be served on the Office of the Cumberland County District Attorney by hand delivery or by depositing a conformed copy of the same in the U.S. Mail, first class postage prepaid, addressed as follows:

Office of the District Attorney
Cumberland County
142 Federal Street
Portland, ME 04102

Dated: October 15, 2019

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